92-738

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

RICHARD CRUZ BREQUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Fifth Circuit Court of Appeals correctly construe 18 United States Code § 1956(a)(3), in conflict with decisions by the Second and Sixth Circuit Courts of Appeals, when it dispensed with the requirement that a law enforcement officer represent to a putative defendant, during a money laundering "sting, that the property involved in a financial transaction is proceeds of a statutorily specified unlawful activity."

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case before this Honorable Court.

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For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Cruz Breque respectfully prays that a Writ of Certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on June 15, 1992. Rehearing and Rehearing en banc were denied July 28, 1992.

OPINION BELOW

The opinion of the court of appeals, styled *United States of America v. Richard Cruz Breque,* was entered on June 15, 1992, and is published at 964 F.2d 381 (5th Cir. 1992). The opinion is reproduced in the Appendix.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 15, 1992. Rehearing and rehearing en banc were denied on July 28, 1992. This petition was filed within ninety days from the date of the denial of the petition for rehearing. SUP.CT.R. 13.1 and SUP.CT.R. 13.4. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 18, United States Code § 371 provides in pertinent part that:

> If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18, United States Code § 1956(a)(3) provides that:

> (3) Whoever, with the intent –
>
> (A) to promote the carrying on of specified unlawful activity;
>
> (B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or
>
> (C) to avoid a transaction reporting requirement under State or Federal law,
>
> conducts or attempts to conduct a financial transaction, involving property represented by a law enforcement officer to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

STATEMENT OF THE CASE

A. Course of Proceedings.

Petitioner Richard Cruz Breque was indicted for conspiracy to fail to file a Currency Transaction Report, in violation of 18 U.S.C. § 371, and 31 U.S.C. §§ 5313, 5322(a); and for conspiracy to launder money, in violation of 18 U.S.C. §§ 371 and 1956(a)(3)(C). Mr. Breque was convicted of each count following a jury trial, and was sentenced by the district court to a term of fifty-five months' confinement in the custody of the Bureau of Prisons.

On June 15, 1992, a panel of the Fifth Circuit Court of Appeals affirmed Mr. Breque's convictions, but vacated his sentence, and remanded his case to the district court for resentencing. *See* Appendix at 1a. Rehearing and rehearing en banc were denied on July 28, 1982. *Id.*

B. Statement of Facts.

In early 1989, a joint investigation was initiated by the San Antonio Internal Revenue and Customs Services called the "Vagabond Project." The object of the project was to determine whether Casas de Cambios (houses of exchange) along the Texas-Mexico border were complying with Currency Transaction Reporting (CTR) requirements. Acting in an undercover capacity, Ms. Lucila Rangel, a Special Agent with the Internal Revenue Service's Criminal Investigation Division, contacted Mr. Breque, a San Antonio insurance agent, and informed him that she had a large quantity of currency that needed to be put in a useable form. Agent Rangel advised Mr.

Breque that she was looking for someone who could exchange U.S. dollars for Mexican pesos in bulk quantities.

On June 8, 1989, Agent Rangel first met Mr. Breque, and an individual by the name of Jorge Enriquez, at a restaurant in Laredo, Texas. After lunch, the three traveled to the El Centenario Casa de Cambio in Laredo, owned by Mr. Carlos Castiglioni. There, Agent Rangel exchanged $15,000 in United States currency for an equivalent in Mexican pesos. No information was either requested or provided to complete a Currency Transaction Report.

On June 20, 1989, Agent Rangel and Mr. Breque planned to meet again to exchange dollars for pesos, this time in San Antonio. Due to a misunderstanding between Mr. Breque and the agent, no transaction took place. Nevertheless, Mr. Breque and Agent Rangel had a lengthy meeting at a local hotel which was surreptitiously audio and video taped. It is, in essence, the June 20th meeting which served as the basis of Mr. Breque's conviction for conspiracy to launder money.

C. The Meeting of June 20, 1989.

At the June 20th meeting in San Antonio, Agent Rangel made "veiled references" to drug dealing, and she and Mr. Breque generally discussed a variety of money laundering techniques. During this most crucial meeting, Agent Rangel stated to Mr. Breque:

> Uhm, I wanted to ask you . . . some things, uhm, as I said to you *my people in, uh, Florida, wanted me to ask you some things,* uh, we've got

kind of a problem . . . *we've got a lot of money that's going to be coming in* . . .

* * *

. . . *here, in a couple weeks* . . . Probably around, I can estimate, right now around half a million dollars. And we're going to . . . it's going to have to go four different ways. OK? *The people that really own the money, they want it as soon as possible.*

* * *

Uhm well, as soon as, I can get it, bring it or, probably it will be my boss this time because it's a big amount like that. *Uh as soon as he can get it somewhere, get it in to a usable form to them* and then, get it back to 'em a couple days, but . . . he kind of is very, you know, close with money. . . . (Emphasis added.)

Later in the meeting, the pertinent portion of the discussion, quoted in the court of appeals' opinion, proceeded as follows:

BREQUE: [L]ike I was . . . telling Mike, one of the things that's really gotten this thing very bad is all your TV movies, Miami Vice and everything that's making everybody kinda jittery, things the way are going . . .

RANGEL: yeah, and especially when, *like I said, things get, things are getting warm*

BREQUE: *Uh huh*

RANGEL: *in Florida right now.* You know, and along the East . . .

BREQUE: Yeah, it's strange, all of a sudden, it just kinda started goin', I guess they didn't like

selling the boats and cars and everything. Now they want to get some more money out some place else and it's kinda dumb, it's stupid

RANGEL: well, they just, you know, they told me, you scout, go West (laughs) and find something. Find a way

BREQUE: you know

RANGEL: *because our people are getting very nervous down there. The people we normally do business with . . .*

BREQUE: Uh Hum

RANGEL: You know, *are very nervous* and, and

BREQUE: a lot, everybody's nervous.

(Emphasis added)

Though the conversation between Agent Rangel and Mr. Breque may have had general criminal overtones, no representation was ever made by Agent Rangel to Mr. Breque that the dollars to be exchanged for pesos were drug proceeds or the proceeds of any other unlawful activity specified at 18 U.S.C. § 1956(c)(7).

D. The Decision of the Court of Appeals

On appeal, Mr. Breque contended that the evidence was insufficient as a matter of law to support his conviction for conspiracy to violate 18 U.S.C. § 1956(a)(3)(C). *United States v. Breque*, 964 F.2d 381, 387 (5th Cir. 1992). Appendix at 12a. Rejecting Mr. Breque's argument and affirming his conviction, the court of appeals found that:

> . . . Rangel never explicitly informed Breque that the dollars [she was seeking to

> exchange] were the proceeds of drug activity. She did, however, allude to it strongly. During their June 20 discussion, Rangel told Breque that "my people down in . . . Florida wanted me to ask you some things, uh, we've got kind of a problem . . . we've got a lot of money coming in," which they needed to put "into a useable form." Rangel also stated that "things are getting pretty warm in Florida right now," to which Breque responded that the television show "Miami Vice," a show about narcotics dealing, "made everybody kinda jittery." Breque also opined that law enforcement agents were no longer satisfied "selling the boats and cars and everything," referring to the seizure of items used in drug trafficking.

Id. 964 F.2d at 387. Appendix at 13a and 14a. In so doing, the court of appeals dispensed with the requirement that Agent Rangel, or some other law enforcement officer, represent to Mr. Breque that the dollars sought to be exchanged were the proceeds of unlawful activity specified in 18 U.S.C. § 1956(c)(7). Instead, the court of appeals focused on Mr. Breque's apparent understandings:

> While Rangel's language with Breque may have been ambiguous (unlike her express representations to Castiglioni) to a layman. *Breque's responses reveal that Breque understood her comments to mean that the currency came from drug trafficking activity.*

id. (emphasis added). Appendix at 14a. Declining to reach the question of legal sufficiency, the court of appeals found that:

> . . . there was sufficient evidence from which a *jury* might conclude that Rangel represented to Breque that the funds were the proceeds of drug activities.

Id. (emphasis added). Appendix at 14a. In this way, the court of appeals transformed Mr. Breque's question of legal sufficiency for the court, into one of factual sufficiency for the jury.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's interpretation of the requirements of 18 U.S.C. § 1956(a)(3) is contrary to the plain and unambiguous language of the statute which requires that a law enforcement officer represent to a defendant that the property involved in a financial transaction constitutes proceeds from a specified unlawful activity, described at 18 U.S.C. § 1956(c)(7). In order to avoid application of the plain language of the statute, the court of appeals concluded that the question of whether a law enforcement officer made the statutory "representation" was not one of law for the court, but one of fact to be resolved by the jury. This same reasoning was recently applied by the court of appeals in affirming a defendant's conviction for money laundering in *United States v. Fuller,* 1992 WL 252817 (5th Circuit, October 6, 1992).

Beyond its disregard for the plain language of the statute, the Fifth Circuit's interpretation of the requirements of § 1956(a)(3) conflicts with its own decision in *United States v. Arditti,* 955 F.2d 331 (5th Cir. 1992), and

with decisions of the Second and Sixth Circuit Courts of Appeals.

As the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this court, certiorari should be granted. SUP.CT.R. 10.1(c). Certiorari should also be granted because the Fifth Circuit Court of Appeals has rendered a decision in conflict with the decisions of two other United States courts of appeals on the same matter. SUP.CT.R. 10.1(a).

I. THE FIFTH CIRCUIT'S INTERPRETATION OF § 1956(a)(3) IS CONTRARY TO THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE STATUTE.

Title 18, United States Code § 1956(a)(3) was enacted by Congress in 1988 to enhance the ability of law enforcement officers to convict money launderers. To constitute an offense under 18 U.S.C. § 1956(a)(3)(C), the Government must prove that a defendant, with the intent

> (C) to avoid a transaction reporting requirement under State or Federal law.
>
> conducts or attempts to conduct a financial transaction involving property *represented by a law enforcement officer to be the proceeds of specified unlawful activity* . . . (emphasis added).

By its terms, the plain and unambiguous language of § 1956(a)(3) requires that a "representation" be made by a law enforcement officer as a predicate to criminal liability.

Here, as in all cases of statutory construction, the unambiguous language of a statute must ordinarily be regarded as conclusive in the absence of a clearly expressed legislative intent to the contrary. *United States v. Turkette,* 452 U.S. 576, 580 (1981). *See also Ford Motor Credit Company v. Cenance,* 452 U.S. 155, 158 n.3 (1981). Thus, where resolution of a question of federal law turns on a statute and the intent of Congress, courts must look first to the language of the statute itself, and only to the legislative history if the statutory language is unclear. *Bium v. Stenson,* 465 U.S. 886, 896 (1984); *Davis v. Michigan Department of Treasury,* 109 S.Ct. 1500, 1504 n.3 (1989) ("Legislative history is irrelevant to the interpretation of an unambiguous statute."); *Crandon v. United States,* 110 S.Ct. 997 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.").

Simply stated, under the plain language of § 1956(a)(3), the Government must demonstrate, as part of its proof, that a law enforcement officer represented to a criminal defendant that the property involved in a financial transaction constitutes proceeds of a statutorily specified or lawful activity. Under the plain and unambiguous language of the statute, it is not enough for a law enforcement officer to make "veiled allusions" that the property comes from some illicit source, as occurred in Mr. Breque's case. Under the express terms of the statute, the representation by a law enforcement officer as to the nature of the proceeds is an element of the offense which must be proven by the government as a matter of law,

and cannot be inferred from the evidence as a matter of fact.

II. THE FIFTH CIRCUIT WRONGLY TRANSFORMED MR. BREQUE'S ISSUE OF LEGAL SUFFICIENCY INTO ONE OF FACTUAL SUFFICIENCY.

Both on appeal, and in the district court, Mr. Breque challenged the legal sufficiency of the Government's evidence to support his conviction for conspiracy to launder money.[1] At the hearing on Mr. Breque's Rule 29 motion for judgment of acquittal in the district court, the government conceded that the statutory representation had not been made to Mr. Breque. It was the Government's position that because law enforcement officers had made the statutorily mandated representation to Mr. Breque's codefendant – at a time when Mr. Breque was by all accounts no longer participating in the conspiracy – the representation was imputed to Mr. Breque under a *Pinkerton* theory of vicarious liability. Specifically, the Government argued:

> Also, the other member of the conspiracy, Mr. Castiglioni, was explicitly told that this is drug money. It's from traffickers. *Now he was told that after the agents ceased to go through Mr. Breque but under a Pinkerton theory, I believe that*

---

[1] In order to prove that Mr. Breque was guilty of conspiring to commit the offense of money laundering, pursuant to 18 U.S.C. § 1956(a)(3)(C), the Government was required to prove that he agreed to commit every *element* of the underlying substantive offense. *United States v. Conroy*, 589 F.2d 1258, 1279 (5th Cir. 1979).

> *would encompass the scope of the conspiracy* . . . (emphasis added).[2]

Based on the trial record, the court of appeals was constrained to find that no express representation had been made to Mr. Breque regarding the source of the funds. *United States v. Breque*, 964 F.2d at 387; *see* Appendix at 13a. Rather than conclude that the evidence was legally insufficient to support Mr. Breque's conviction, however, the court of appeals transformed the question into one of *factual* sufficiency to be resolved, in this case, by the jury. In this way, the court of appeals came to the rather bewildering conclusion that, although no law enforcement officer represented to Mr. Breque that the funds to be exchanged were proceeds of a statutorily specified or lawful activity, as required by § 1956(a)(3)(C), the *jury* could have concluded that such a representation was made as a matter of *fact*. *Id.*

A.

The Decision In Mr. Breque's Case Conflicts With The Court of Appeals' Earlier Decision In *United States v. Arditti*, And Has Apparently Become Controlling Authority In The Fifth Circuit.

In *United States v. Arditti*, 955 F.2d 331 (5th Cir. 1992), also a "sting" operation, the undercover agent represented to each of the defendants whom he dealt with that he was in the "coke" business. *Id.*, 955 F.2d at 334-35. To the defendant, Avila, the agent plainly told him:

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[2] Unsurprisingly, the Government abandoned the *Pinkerton* theory on appeal.

> "I am in the coke business. That's what I do. Now you will never have to be involved in that part of it."

Id., 955 F.2d at 335. The agent then offered Mr. Avila the opportunity to back away from the deals because of the source of the funds. *Id.* Mr. Avila did not back away and engaged in more than one transaction with the undercover agent.

As he did with the defendant, Avila, the agent offered the defendant, Arditti, the chance to "walk away from the deal" if Arditti had a "problem with the money or what I do." *Id.* As reflected in the opinion of the court of appeals, when Mr. Arditti responded by stating that he "had not asked what kind of business [the agent] did," the agent clarified by telling Arditti, "You understand this is coke money." *Id.*

Like Mr. Breque here, Mr. Avila in *Arditti* challenged the sufficiency of the evidence to support his conviction for money laundering under § 1956(a)(3). *Id.*, 955 F.2d at 338-39. Avila apparently contended that under § 1956(a)(3), a law enforcement officer must make the predicate "representation" prior to *each* financial transaction. *Id.*, at 339. In analyzing Avila's claim, the court of appeals began its discussion by noting that:

> Section 1956(a)(3), in establishing the basis for money laundering "sting" operations, requires that the government agent represent that the property involved in the transaction is the "proceeds of specified unlawful activity . . . "

Id. The court of appeals, however, was not persuaded by Mr. Avila's reasoning:

> We find Avila's arguments unconvincing. The record shows that "Adams" [the undercover agent] told Avila that he was in the cocaine business and that the initial $15,000 was the proceeds of a collection. Because "Adams" represented his business as drug wholesaling, then never represented his relationship with Avila as one involving funds not derived from that illicit industry, the jury could have viewed the *later* $40,000 as ostensible drug-related funds . . .
>
> To hold that a government agent must recite the alleged source of *each set of property* at the time he attempts to transfer it in a "sting" operation would make enforcement of the statute extremely and unnecessarily difficult . . .

Id. (emphasis added). Though the court of appeals held in *Arditti* that the statutory representation need not be made prior to *each* financial transaction, it implicitly concluded that the representation must be made on at least one occasion. *Id.* As to the *later* transactions, the court of appeals concluded that:

> In this case, it is enough that sufficient evidence was presented that the jury could have found beyond a reasonable doubt that "Adams" represented, and Avila understood, that the funds they were laundering were the proceeds of the specified illegal activities.

Id.

Unlike the factual situation presented in *Arditti*, wherein the statutory representation was actually made to each defendant on at least one occasion, no explicit representation as to the source of the funds in issue was ever made to Mr. Breque by any law enforcement officer

nor was Mr. Breque given the opportunity to back away. It appears that, in order to affirm Mr. Breque's conviction, the court of appeals relied on isolated language in *Arditti*, taken wholly out of context, and in conflict with *Arditti's rationale.*

It now appears that Mr. Breque's case has become controlling authority in the Fifth Circuit. Since Mr. Breque's case was decided, and in reliance thereon, the court of appeals decided *United States v. Fuller,* 1992 WL 252817 (Fifth Circuit, October 6, 1992). In *Fuller,* as in Mr. Breque's case, a codefendant, Mr. Foster, argued that the evidence was insufficient to support his conviction for money laundering because a law enforcement officer had not represented to him that the funds involved in the financial transaction were from the illegal sale of drugs – a specified unlawful activity. *Id.* In resolving Mr. Foster's sufficiency challenge, the court of appeals had this to say:

> Foster, having attended only one of the three meetings between Fuller [the codefendant] and Martinez [the undercover agent], claims that he was never informed by Martinez that the Martinez funds were from the illegal sale of drugs. Supported by citations previously reported, *we ask whether a rational trier of fact could have found beyond a reasonable doubt that Foster was aware of the source of the Martinez funds. . . . Viewing the evidence in a light favorable to the verdict, we find sufficient evidence to support the conclusion that Foster knew the funds came from an illegal source.*

Id. (emphasis added).

The court of appeals in *Arditti, Breque* and *Fuller,* has progressively diluted the requirements of § 1956(a)(3). In *Arditti,* the court of appeals required that the predicate representation be made to a defendant on at least one occasion to satisfy the requirements of § 1956(a)(3). In Mr. Breque's case and, again, in *Fuller,* the court of appeals dispensed entirely with the need for an explicit representation as to the source of the property involved in a financial transaction. In Mr. Breque's case and, again, in *Fuller,* the court of appeals has effectively re-written § 1956(a)(3) to permit conviction where the Government proves, merely, that a defendant "knew" that the property involved in the financial transaction was proceeds from "an illegal source" or "were the product of an illicit activity." *United States v. Fuller, supra.* Under the court of appeals construction, a law enforcement officer need not actually make the representation described in § 1956(a)(3) as a predicate to criminal liability. Instead in the Fifth Circuit, the question of whether the statutory "representation" was made to a defendant is but a jury issue. *United States v. Breque,* 964 F.2d at 387 ("We find that there is sufficient evidence from which a jury might conclude that Rangel represented to Breque that the funds were the proceeds of drug activities); *United States v. Fuller,* 1992 WL 252817 ("The jury could reasonably conclude that Martinez *led Foster to believe* that the funds were the *product of an illicit activity.*") (emphasis added). Indeed, in view of *Fuller,* a jury can predicate a finding of guilt under § 1956(a)(3) if it finds, merely, that a defendant believed the funds involved in a financial transaction were the proceeds of *any* illegal activity as, for example, gambling or prostitution – neither of which is specified in

§ 1956(c)(7). Nowhere in the text of § 1956(a)(3) is there any language to suggest that guilt can be predicated upon the mere showing of a defendant's apparent "knowledge" or "understanding" as to the source of property involved in a financial transaction.

B.

The Court of Appeals' Interpretation of The Requirements Of § 1956(a)(3) In Mr. Breque's Case And, Again in *Fuller*, Conflicts With Decisions Of The Second And Sixth Circuit Courts of Appeals.

The court of appeals' interpretation of § 1956(a)(3) in Mr. Breque's case, and in *United States v. Fuller*, conflicts with decisions of the Second and Sixth Circuit Courts of Appeals. In *United States v. Stavroulakis*, 952 F.2d 686 (2d Cir. 1992), the Second Circuit discussed the requirements of § 1956(a)(3) and noted:

> That the money is represented to be the proceeds of one of the listed, illegal sources is, of course, *essential to culpability.*

Id., 952 F.2d at 691 (emphasis added).

In *United States v. Loehr*, 966 F.2d 201 (6th Cir. 1992), a "sting" operation was initiated to determine whether the defendant was laundering money through his employer's car dealership. *Id.*, 966 F.2d at 202. The sting required that undercover informants "attempt the purchase of an automobile after *clearly informing* the defendant that the purchase price was to be paid from drug proceeds." *Id.* (emphasis added).

On appeal, the defendant challenged his conviction under § 1956(a)(3) on the ground that the statute was

void-for-vagueness. *Id.*, 966 F.2d at 203-04. The Sixth Circuit rejected the defendant's challenge noting, preliminarily, that statutory construction begins with the plain meaning of the words in the statute. *Id.*, 966 F.2d at 204. In analyzing the requirements of the statute, the Sixth Circuit had this to say:

> An examination of 18 U.S.C. § 1956(a)(1)(B) indicates that in order for an accused to be convicted under the above provision, the government must prove that he had the specific intent to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity. *Furthermore, representations must be made by law enforcement officers, or by those acting under their direction, and must relate to specified unlawful conduct enumerated in the statute pursuant to § 1956(c)(7). The provision is clear and applies to anyone who has the requisite intent to engage in the conduct as defined in the statute.*

Id. (emphasis added).

Contrary to the decisions of the Fifth Circuit Court of Appeals, both the Second and the Sixth Circuit have concluded that the predicate representation by a law enforcement officer under § 1956(a)(3) is an essential element of the offense which must be proven by the Government as a matter of law.

CONCLUSION

In sum, in disregard of the plain language of the statute, the court of appeals has effectively rewritten § 1956(a)(3) by dispensing with the requirement that a law enforcement officer, or his agent, represent to a defendant that property involved in a financial transaction is proceeds of a statutorily specified unlawful activity. Instead, the court of appeals authorizes conviction under the statute, in the absence of a specific representation, based upon what a jury infers that a defendant either "knew" or "understood."

The court of appeals' decision in Mr. Breque's case appears to conflict with its earlier decision in *United States v. Arditti, supra*. The court of appeals' construction of § 1956(a)(3) also directly conflicts with decisions of the Second and Sixth Circuit Courts of Appeals.

WHEREFORE, RICHARD CRUZ BREQUE respectfully prays that this Honorable Court grant certiorari to review the decision of the court of appeals.

Respectfully submitted,

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APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Richard Cruz BREQUE, Defendant-Appellant,

No. 91-5625

United States Court of Appeals,
Fifth Circuit.

June 15, 1992.
Rehearing and Rehearing En Banc
Denied July 28, 1992.

Nancy B. Barohn, Henry Ridgeway, San Antonio, Tex., for defendant-appellant.

Donald C. Lockhart, Atty., Dept of Justice, Washington, D.C., Ronald F. Ederer, Richard L. Durbin, Jr., U.S. Attys., San Antonio, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before HILL,* KING, and DAVIS, Circuit Judges.

KING, Circuit Judge:

Richard Cruz Breque appeals his conviction for conspiracy in violation of 18 U.S.C. § 371, 18 U.S.C. § 1956(a)(3), and 31 U.S.C. §§ 5313 and 5322(a). He also appeals his sentence. We affirm his conviction on all counts but vacate his sentence.

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*Senior Circuit Judge of the Eleventh Circuit, sitting by designation.

I. STATEMENT OF THE CASE

We address the facts of this case in some detail. As a result of various investigations by the San Antonio branches of the Internal Revenue Service ("IRS") and the United States Customs Service, the authorities suspected that Breque and others were laundering unreported currency through El Centenario, a money exchange business in Laredo, Texas. Lucila Rangel, a special agent with the IRS, contacted Breque with money laundering proposals. Rangel called herself "Lucy Moreno," and told Breque that she was a representative of a Miami organization in need of money exchange services.

On June 6, 1989, Rangel telephoned Breque and asked if he would exchange $20,000 for pesos. Breque agreed to do so for a 10% commission. Rangel remarked that the rate was very high, to which Breque responded that he charged that much "because of the way things are." Rangel finally assented to Breque's terms and the two agreed to meet on June 8 at a Denny's Restaurant in Laredo to finalize the deal.

On June 8, 1989, Rangel drove to the Denny's Restaurant and arrived at the scheduled time. Breque and an associate, Michael Zuniga, arrived half an hour later and informed Rangel that the three would drive together in Rangel's car to a nearby restaurant, called the Unicorn. When the group entered the Unicorn, Breque arranged for them to sit in a private section. Following lunch, Rangel informed Breque and Zuniga that she had only $15,000. The news upset Breque and he left the table to make a phone call. When he returned, he explained that the people he was dealing with had backed out of the

transaction. He suggested, however, that the three should simply divide the $15,000 between them and exchange the portions individually. Rangel rejected his proposal, prompting Breque to assure her that a man named George Enriquez would join them shortly and would resolve the matter.

Enriquez arrived at the Unicorn a few minutes later and announced that the necessary pesos were being gathered. At that point, Breque remarked that if there were any papers to complete, he and Enriquez would do so later on. Enriquez grimaced in response and said "oh, no, no, no." Breque then said "okay" and Rangel said "okay." Rangel's interpretation of the discussion was that they had agreed not to file the required Currency Transaction Report ("CTR")[1] with respect to the $15,000 exchange.

The group then drove to the El Centenario money exchange. Breque directed them to a back room of the business and introduced them to Carlos Castiglioni. Rangel removed $15,000 in cash from a camera case and placed it on Castiglioni's desk. Castiglioni counted the money on a machine and handed Rangel a large sum of pesos. No one asked Rangel for any of the information necessary to complete a CTR, and no CTR was filed relating to that transaction. Following the deal at El Centenario, the group returned to the Denny's Restaurant and Rangel paid Breque $1,500 for his services in arranging the exchange.

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[1] A Currency Transaction Report must be filed with the IRS when the amount of the exchange exceeds $10,000. *See* 31 C.F.R. § 103.22(a)(1) (1991).

On June 15, 1989, Rangel telephoned Breque and they agreed to meet on June 20 in San Antonio to exchange $40,000 for pesos. Breque told Rangel that he would come to her hotel room, pick up her money, and then drive to a secret highway intersection, where an unnamed person would meet him to make the exchange. Afterwards, he would return to her hotel room with the pesos. During the same phone call, Rangel mentioned that a suspicious looking car had followed them on the day of the June 8 meeting, to which Breque replied:

> I don't think, I don't think it was uh, you know, I don't think it was anything federal or anything. I think it was just a bunch of guys that maybe thought we were, we had too much and maybe they wanted a little bit.

Rangel later interpreted those remarks for the jury as indicating that Breque "didn't think it was any federal agents or anything. He just thought it was maybe a rip off."

The meeting on June 20, 1990, took place at the Embassy Suites Hotel in San Antonio, and was recorded by a hidden video camera. Due to a misunderstanding between Breque and Rangel, and because Castiglioni could not supply the required pesos, no transaction occurred that day. During the meeting, Rangel made veiled references to drug dealing and the parties discussed illegal money laundering. Discussing various money laundering techniques, Rangel criticized the "old, worn out method" of taking money to a "friendly person." Breque agreed that the "friendly banker" method

would no longer work because "[t]hey're all getting burned that way."[2] The discussion progressed as follows:

> [Breque:] [L]ike I was . . . telling Mike, one of the things that's really gotten this thing very bad is all your TV movies, Miami Vice and everything that's making everybody kinda jittery, things the way are going . . .
>
> [Rangel:] yeah, and especially when, like I said, things get, things are getting warm
>
> [Breque:] Uh huh
>
> [Rangel:] in Florida right now. You know, and along the East . . .
>
> [Breque] Yeah, it's strange, all of a sudden, it just kinda started goin', I guess they didn't like selling the boats and cars and everything.[3] Now they want to get some more money out some place else and it's kinda dumb, it's stupid

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[2] At trial, Rangel explained that, in money laundering jargon, the "friendly banker . . . is a banker who will sort of wink at the reporting requirements and sort of let is slide and take the currency into the bank without filing the proper forms." Rangel further stated that Breque's comment "they're all getting burned that way," referred to the fact that "there has been a lot of enforcement activity involving banks and those CTR filing requirements."

[3] Rangel explained at trial that "Miami Vice was a television program about narcotics interdiction and about people getting arrested and for dealing drugs." She further explained that Breque's statement that "they didn't like selling the boats and cars" was a reference to the seizure of vehicles and vessels used in narcotics trafficking.

> [Rangel] well, they just, you know, they told me, you scout, go West (laughs) and find something. Find a way
>
> [Breque] you know
>
> [Rangel]: because our people are getting very nervous down there. The people that we normally do business with . . .
>
> [Braque:] Uh hum
>
> [Rangel:] You know, are very nervous and, and
>
> [Breque:] a lot, everybody's nervous.

In the course of the conversation Breque claimed that he owned two offshore corporations and that he could easily handle $500,000 at a time. He also boasted that he had influence with the Prime Minister of Bermuda, and advised Rangel that she should consider opening a bank account there. Breque joked at one point about the possibility that Rangel was a law enforcement officer: "I mean, you're not going to put somebody in jail over there if you were who, who you might be, I hope not. I'm going to knock on wood on that one."[4]

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[4] Breque defended his language at this meeting by explaining that he believed he had unwittingly stumbled into the company of "gangsters," and that to avoid being killed as a potential informant he pretended to be a gangster himself. Thus, Breque used expressions like "friendly banker" because they made his performance more realistic. In fact, he said, he had learned of that euphemism in a newspaper article, not through real life experience. Similarly, he testified that the line about offshore corporations had popped into his head because he had heard it in the movie "Lethal Weapon II."

Several times during the week after the June 20 meeting Breque telephoned Rangel with various proposals relating to money laundering. On June 27, 1989, Rangel returned one of Breque's calls and they arranged to meet on July 6 at La Posada hotel in Laredo to exchange $60,000 for pesos. Castiglioni testified at trial that he and Breque worked together on the details of the July 6 deal. Finding $60,000 in pesos was not easy, however. As of the morning of July 6, the pair had obtained only $30,000 worth of pesos and Castiglioni was therefore forced to drive to Mexico to pick up the remaining half.

That afternoon, Breque and Castiglioni met Rangel and another agent, Ruiz, at the hotel and exchanged the $60,000 for pesos. Following the exchange, Rangel paid Breque a 6½% commission. Again, no one asked Rangel for information necessary to complete a CTR, and no CTR was filed. Castiglioni admitted at trial that he made no effort to acquire this information and stated that he knew at the time that every one concerned wished to avoid the CTR filing.

Following the July 6 transaction, Castiglioni met directly with Rangel and Ruiz on October 11, 1989, November 15, 1989, and January 24, 1990. On each occasion, they exchanged United States currency for pesos, and Castiglioni did not report the transactions. During the first meeting, Ruiz informed Castiglioni that their clients were "traffickers" who needed "money cleaned." During the second meeting, Castiglioni announced that he would charge an additional 2% fee for his services because of the dangers involved with laundering drug money. During the third meeting, the parties again discussed the illegal source of the funds.

On June 26, 1990, Rangel phoned Castiglioni and they agreed that Castiglioni would meet Ruiz and another undercover agent for a $100,000 "emergency" exchange of pesos. This time, Castiglioni insisted on a 5% fee. Castiglioni also informed Rangel that he was working with Breque again, and that Breque would assist him with the planned transaction. At trial, Castiglioni testified that Breque advised him to increase his fee to 5% because the "service that we were providing was worth a lot more for these people." The Government cross-examined Castiglioni on the subject of the services rendered as follows:

> [Government:] The service you were providing was worth a lot more than the two percent that you were charging?
>
> [Castiglioni:] Correct.
>
> [Government:] But you were providing the service that you provide to anybody who walked into El Centenario. Right?
>
> [Castiglioni:] Yes.
>
> [Government:] I mean if I came in with a hundred – you might have trouble getting it together on the spot, but if I came in with a hundred thousand dollars and wanted to exchange it, you'd do it with me, wouldn't you, at that time, if you could put it together?
>
> [Castiglioni:] Yes, but I have to file a form.
>
> [Government:] But you have to file a form. That's the service you're providing is not filing a form, and also – but you had been dealing with these people and not filing a form and not charging them five percent for quite some time. Right?

> [Castiglioni:] Correct.
>
> [Government:] but just like you said to Agent Ruiz, it's got to be more. It's got to be at least two percent because you people are saying that you're drug dealers. You got to expect that, so Mr. Breque is advising that because of the service you're providing, not just the exchange and not just failing to file a form, because of who you're dealing with
>
> [Castiglioni:] Correct
>
> [Government:] – you're going to charge more. Right? Right?
>
> [Castiglioni:] Correct.

When Breque and Castiglioni arrived at La Posada hotel on the afternoon of June 28, federal officers placed them under arrest.

Following a jury trial in the United States District Court for the Western District of Texas, Breque was convicted of conspiring with Castiglioni and Enriquez to fail to file CTRs in violation of 18 U.S.C. § 371 and 31 U.S.C. §§ 5313 and 5322(a).[5] In addition, Breque was convicted of conspiring with Castiglioni to launder money represented by a law enforcement officer to be the proceeds of specified unlawful activity (narcotics sales), in violation of 18 U.S.C. § 1956(a)(3)(C).

Pursuant to United States Sentencing Guidelines ("U.S.S.G.") § 2S1.1, the district court sentenced Breque to

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[5] Castiglioni pleaded guilty to this crime prior to Breque's trial.

a term of imprisonment of fifty-five months, to be followed by a three-year term of supervised release. He was also charged $10,000 in fines and a $100 special assessment. This appeal followed.

II. DISCUSSION

A.

Pursuant to 31 U.S.C. § 5313(a) and 31 C.F.R. § 103.22(a)(1), financial institutions must file CTRs with the IRS when they engage in individual currency transactions exceeding $10,000. A person who "willfully" violates the above provisions commits an offense under 31 U.S.C. § 5322(a). *See, e.g., United States v. Gollott*, 939 F.2d 255, 257 (5th Cir.1991). Though the primary responsibility for filing CTRs rests with the agents of the financial institution, "a customer's collusion with a financial institution to avoid filing CTRs . . . constitutes an unlawful conspiracy in violation of 18 U.S.C. § 371." *United States v. Cure*, 804 F.2d 625, 628 (11th Cir.1986) (citations omitted).

Breque contends that the evidence is insufficient to convict him of conspiracy to fail to file CTRs in violation of 18 U.S.C. § 371 and 31 U.S.C. §§ 5313 and 5322(a). We note that the evidence against Breque was sufficient to convict him if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Contreras*, 950 F.2d 232, 236 (5th Cir.1991) (citing *United States v. Lemons*, 941 F.2d 309, 314 (5th Cir.1991)), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2276, 119 L.Ed.2d 202 (1992). We review the evidence "in the light most favorable to the government, drawing all reasonable inferences in favor of the jury's verdict." *Id.*

We find that there is evidence showing that Breque willfully conspired with Castiglioni and Enriquez to fail to file the CTRs because he knew of the reporting requirements and decided not to comply with them. *See United States v. O'Banion*, 943 F.2d 1422, 1429 (5th Cir.1991). On June 8, 1989, Breque met with Rangel and discussed exchanging her $15,000 for pesos. Breque apparently understood the $10,000 filing requirement because he recommended that he, Rangel, and Zuniga divide her $15,000 and exchange the portions individually. Breque subsequently introduced Rangel to Castiglioni who effected the exchange. Castiglioni did not file a CTR, and made no inquiries of Rangel so that he could have done so. While Breque contends that he merely stood idly by and watched Castiglioni make the exchange, it is undisputed that he introduced Rangel and Castiglioni for the purpose of exchanging currency.

The conversation at the Unicorn, during which Breque inquired as to whether he should file forms (and subsequently assented to Enriquez' refusal to do so) demonstrates that Breque knew of the reporting requirements, yet nevertheless agreed not to file a CTR. Furthermore, as the Government points out, the manner in which the exchange was arranged – backroom meetings, mysterious cars, a 10% commission for Breque's services – suggests that the participants were aware that their activities were illegal. At one point, Breque assured Rangel that the car following them was "not federal or anything." At the June 20 meeting, Breque lectured Rangel as to money laundering techniques, and joked about the possibility that she was a law enforcement officer. Breque arranged

for the second unreported currency exchange with Castiglioni and received 6½ commission. Finally, Breque helped Castiglioni plan the $100,000 unreported transaction that led to their arrest.

A rational jury could have found that the evidence proved all elements of the crime. Sufficient evidence therefore supported Breque's conviction for conspiracy to fail to file CTRs.

B.

Breque also contends that the evidence was insufficient to convict him of conspiring with Castiglioni to violate § 1956(a)(3)(C). 18 U.S.C. § 1956(a)(3) provides, in relevant part, as follows:

> (3) Whoever, with the intent –
>
> . . . .
>
> (C) to avoid a transaction reporting requirement under State or Federal law,
>
> conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph . . . the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

18 U.S.C. § 1956(a)(3)(C). Subsection (c)(7) defines "specified unlawful activity" to include a wide range of crimes, including violations of the narcotics laws. 18 U.S.C. § 1956(c)(7). To prove a violation of this section, the Government must prove (1) that the defendant conducted or attempted to conduct a financial transaction, (2) with the intent to avoid a transaction reporting requirement, and (3) that the property involved in the transaction was represented by a law enforcement officer to be the proceeds of specified unlawful activity. 18 U.S.C. § 1956(a)(3)(C).

Prong one of the test is uncontested, and our analysis above satisfies prong two. Only prong three, whether a law enforcement officer represented that the currency presented for exchange was the proceeds of unlawful activity, is at issue.

Breque argues that the Government is trying to hold him responsible for revelations made by Rangel to Castiglioni after Breque left the alleged conspiracy. On October 11, 1989, Rangel explicitly told Castiglioni that her Miami clients were "traffickers" who needed "money cleaned." Later, Castiglioni stated that he would increase his fee because of the dangers involved in exchanging drug money.

We recognize that Rangel never explicitly informed Breque that the dollars were the proceeds of drug activity. She did, however, allude to it strongly. During their June 20 discussion, Rangel told Breque that "my people down in . . . Florida wanted me to ask you some things, uh, we've got kind of a problem . . . we've got a lot of money coming in," which they needed to put "into a useable

form." Rangel also stated that "things are getting pretty warm in Florida right now," to which Breque responded that the television show "Miami Vice," a show about narcotics dealing, "made everybody kinda jittery." Breque also opined that law enforcement agents were no longer satisfied "selling the boats and cars and everything," referring to the seizure of items used in drug trafficking. While Rangel's language with Breque may have been ambiguous (unlike her express representations to Castiglioni) to a layman, Breque's responses reveal that Breque understood her comments to mean that the currency came from drug trafficking activity. Furthermore, on June 28, 1990, Breque joined Castiglioni to plan the $100,000 transaction which led to their arrest. Just prior to the scheduled transaction, Breque advised Castiglioni to charge a 5% commission because of the dangers of dealing with drug dealers. This, too, indicates that Breque understood Rangel to mean that her funds derived from drug-related activities.

We find that there is sufficient evidence from which a jury might conclude that Rangel represented to Breque that the funds were the proceeds of drug activities. A rational jury could have found Breque guilty of conspiracy to violate 18 U.S.C. § 1956(a)(3)(C).

C.

Breque next contends that the district court erred when it instructed the jury as to "deliberate ignorance."[6] The term "deliberate ignorance" "denotes a conscious effort to avoid positive knowledge of a fact which is an element of an offense charged, the defendant choosing to remain ignorant so he can plead lack of positive knowledge in the event he should be caught." *See United States v. Chen*, 913 F.2d 183, 191-92 (5th Cir.1990) (quoting *United States v. Restrepo-Granda*, 575 F.2d 524, 528 (5th Cir.), *cert. denied*, 439 U.S. 935, 99 S.Ct. 331, 58 L.Ed.2d 332 (1978)); *see also United States v. Lara-Velasquez*, 919 F.2d 946, 951 (1976).

Because Breque did not object to this instruction at trial, we review it for plain error.[7] *See* Fed.R.Crim.P. 52(b).

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[6] The instruction reads as follows:

> The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally, not because of mistake or accident.
>
> You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

[7] Breque notes that he objected to the "deliberate ignorance" instruction in his motion for a new trial. That objection was not contemporaneous, however, and therefore the plain error standard still applies. *See United States v. Winn*, 948 F.2d 145, 159 (5th Cir.1991) (objection to jury instruction after jury deliberates is not contemporaneous and is reviewed for plain

According to Rule 52(b), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This court has defined "plain error" as "error which, when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2032, 114 L.Ed.2d 117 (1991).

This circuit applies a two-part test in deciding whether the district court erred in giving a "deliberate ignorance" instruction. *Lara-Velasquez*, 919 F.2d at 952. First, evidence at trial, viewed in the light most favorable to the Government, must show that the defendant was *subjectively* aware of a high probability of the existence of the illegal conduct. Second, the evidence must show that the defendant purposely contrived to avoid learning of the illegal conduct. *Id.* The purpose of this test is clear: if there is no evidence indicating the defendant subjectively knew his act to be illegal, a deliberate ignorance instruction "poses the risk that a jury might convict the defendant on a lesser negligence standard – the defendant *should* have been aware of the illegal conduct." *Id.* at 951 (emphasis in original).

As to the CTR offense, Breque contends that the instruction was wrongly given because the "jury may

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error), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1599, 118 L.Ed.2d 313 (1992).

well have concluded that the Government was only obligated to prove that Breque *should have known* of the reporting requirements." We disagree. As we discussed earlier, the jury was presented with considerable evidence that Breque, in fact, *knew* of the reporting requirements. Indeed, in the conversation at the Unicorn, Breque specifically raised the issue. The instruction could not have misled the jury as to the proper standard to apply.

Breque also contends, in somewhat oblique fashion, that the instruction may have confused the jury into concluding that it could convict Breque of violating 18 U.S.C. § 1956(a)(3) if it found that he *should have known* the money to have been from specified unlawful activity, even absent proof by the Government that a representation was made by Rangel as to the source of her funds. This contention, too, has no merit. As we have noted above, for purposes of § 1956(a)(3), the Government put forth sufficient evidence that Rangel made representations to Breque that the money was proceeds of specified unlawful activity. The instruction in no way suggested that the Government need not have proven that Rangel made a representation. Indeed, the jury instruction which dealt specifically with 18 U.S.C. § 1956(a)(3) made clear to the jury that the Government had to prove that Rangel made a representation. Accordingly, there was no error in giving the deliberate ignorance instruction.

D.

Over Breque's objections at sentencing, the district court raised Breque's base offense level by three levels

pursuant to U.S.S.G. § 2S1.1(b)(1). At the time Breque was sentenced, that section provided as follows:

> If the defendant *knew* that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by 3 levels.

U.S.S.G. § 2S1.1(b)(1) (Nov.1990) (emphasis added). We review the district court's application of the Sentencing Guidelines *de novo*, *see United States v. White*, 945 F.2d 100, 101 (5th Cir.1991), but review the district court's factual findings only for clear error. *United States v. Bachynsky*, 949 F.2d 722, 734 (5th Cir.1991).

Breque argues that the money was not the proceeds of an unlawful activity because it was Government "sting" money. As such, he reasons, he could not "know" the funds to be the proceeds of unlawful activity. To "know" a fact, he suggests, implies the existence or truth of that fact. The plain language of the section, he concludes, precludes its application to his case.[8]

According to the Government, however, for a defendant to "know" that funds are the proceeds of unlawful activity requires only that the defendant be subjectively certain that such is the case. "Know" suggests a high degree of subjective confidence as to a fact, according to

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[8] Breque also argues that § 2S1.3(b)(1) should apply rather than § 2S1.1(b)(1). This argument ignores the fact that the element distinguishing these two sections is that the funds laundered come from narcotics activity. Section 2S1.1(b)(1) speaks directly to the laundering of narcotics proceeds.

the Government, but does not require that the fact be objectively true.

This is an issue of first impression in any circuit, inasmuch as the only decisions to have examined the 1990 version of § 2S1.1(b)(1) involved the laundering of actual proceeds of narcotics dealing. *See United States v. Restrepo*, 936 F.2d 661, 665 (2d Cir.1991); *United States v. Atterson*, 926 F.2d 649 (7th Cir.), *cert. denied sub nom. Laurelez v. United States*, ___ U.S. ___, 111 S.Ct. 2909, 115 L.Ed.2d 1072 (1991). Fortunately, we need not now opine as to the meaning of "knowledge," because we have adequate guidance for our consideration of § 2S1.1(b)(1) from the amended section, effective November 1, 1991, which was not applicable to Breque. The new guideline reads:

> If the defendant *knew or believed* that the funds were proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by 3 levels.

U.S.S.G. § 2S1.1(b)(1) (Nov.1991) (emphasis added). Appendix C of the 1991 Amendments describes the purpose of the amendment to § 2S1.1(b)(1):

> Section 2S1.1(b)(1) is amended by inserting "or believed" immediately following "knew". . . .
>
> This amendment revises this guideline to reflect the enactment of subsection (a)(3) of 18 U.S.C. § 1956 that authorizes undercover "sting" operations in money laundering cases. Such cases differ from those prosecuted under subsection (a)(1) in that the money being laundered is not actually criminal proceeds, but is government

> "sting" money that an undercover officer represents to be criminal proceeds. In all other respects, subsections (a)(1) and (a)(3) are the same. The effective date of this amendment is November 1, 1991.

U.S.S.G. App. C, Amendment 378 (1991) (bold omitted).

While recognizing that the "believed" standard does not apply here because it works a substantive change of the guideline, *see United States v. Miller*, 903 F.2d 341, 347-49 (5th Cir.1990), the Government argues that the amended section suggests the intention behind the earlier draft of § 2S1.1(b)(1). We disagree. Section 2S1.1(b)(1) was amended expressly to include defendants caught in Government sting operations. The addition of the term "believe" to effect this purpose suggests quite strongly that the word "know" in the version of § 2S1.1(b)(1) relevant here is insufficient, by itself, to encompass the state of mind of defendants caught laundering money that is not, in fact, the proceeds of drug activity. *See United States v. Payne*, 962 F.2d 1228 (6th Cir.1992) (finding that amendment of § 2S1.1(b)(1) encompasses individuals who "believe" that sting funds are proceeds of unlawful narcotics activity). As the amendment to the guidelines shows, for the specific purposes of § 2S1.1(b)(1) Breque only "believed" the money to be proceeds of narcotics activity, but could not "know" it to be so. Accordingly, the application of U.S.S.G. § 2S1.1(b)(1) to raise Breque's base offense level three levels was error.

III. CONCLUSION

We AFFIRM Breque's conviction on all counts. As to his sentence, we VACATE and REMAND to the district court for resentencing consistent with this opinion.

Supreme Court, U.S.
FILED
DEC 30 1992
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No. 92-738

In the Supreme Court of the United States

OCTOBER TERM, 1992

RICHARD CRUZ BREQUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence at trial was sufficient to sustain petitioner's conviction for conspiring to launder money represented by a law enforcement officer to be the proceeds of specified unlawful activity, in violation of 18 U.S.C. 371 and 1956(a)(3)(C).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 964 F.2d 381.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1992. A petition for rehearing was denied on July 28, 1992. The petition for a writ of certiorari was filed on October 26, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conspiring to fail to file currency transaction reports, in violation of 31 U.S.C. 5313 and 5322(a), and conspiring to launder money represented by a law enforcement officer to be the proceeds of specified unlawful activity, in violation of 18 U.S.C. 371 and 1956(a)(3)(C). He was sentenced to 55 months' imprisonment, to be followed by three years of supervised release.

1. In the late 1980s, the Internal Revenue Service and the Customs Service began an investigation into whether petitioner and others were laundering unreported currency through El Centenario, a money exchange business in Laredo, Texas. IRS Agent Lucila Rangel contacted petitioner with money laundering proposals. In her undercover role, Rangel played "Lucy Moreno," a representative of a Miami organization interested in exchanging large amounts of United States currency for Mexican pesos. Pet. App. 2a; Gov't C.A. Br. 3.

On June 6, 1989, Agent Rangel telephoned petitioner and asked if he would exchange $20,000 for pesos. Petitioner agreed to do so for a ten percent commission. When Rangel remarked that the rate was very high, petitioner replied that he charged that much "because of the way things are." Rangel agreed to petitioner's terms, and they arranged to meet two days later at a restaurant in Laredo. Pet. App. 2a; Gov't C.A. Br. 3-4.

On June 8, Rangel arrived at the restaurant at the scheduled time. When petitioner and an associate arrived, petitioner informed Rangel that they would

drive together in Rangel's car to another nearby restaurant. When the group arrived at the second restaurant, petitioner arranged for them to sit in a private section. Following lunch, Rangel informed petitioner that she had only $15,000. Upset at that news, petitioner left the table to make a phone call. When he returned, he explained that the people he was dealing with had backed out of the transaction. Petitioner said, however, that a man named George Enriquez would join them shortly and would resolve the matter. Pet. App. 2a-3a; Gov't C.A. Br. 4.

A few minutes later, Enriquez arrived and announced that the necessary pesos were being gathered. When petitioner asked whether there were any papers to complete, Enriquez grimaced in response and said "oh, no, no no." Petitioner then said "okay" and Rangel said "okay." The group then drove to the El Centenario money exchange, where petitioner directed them to a back room and introduced them to Carlos Castiglioni. As petitioner stood by, Rangel removed $15,000 in cash from a camera case and placed it on Castiglioni's desk. After he counted the money on a machine, Castiglioni handed Rangel a large sum of pesos. Neither petitioner nor Castiglioni asked Rangel for any of the information necessary to complete a Currency Transaction Report (CTR), and no CTR was filed for the transaction. Following the deal, Rangel paid petitioner $1,500 for his services in arranging the exchange. Pet. App. 3a; Gov't C.A. Br. 4-5.

On June 15, 1989, Rangel telephoned petitioner, and they agreed to meet on June 20 in San Antonio to exchange $40,000 for pesos. During that telephone conversation, petitioner told Rangel that he would come to her hotel, pick up her money, and then drive

to a secret highway intersection where an unnamed person would meet him to make the exchange. Petitioner stated that he would return to Rangel's hotel afterward with the pesos. When Rangel mentioned that a suspicious looking car had followed them on June 8, petitioner replied that he didn't think "it was anything federal or anything." Pet. App. 4a; Gov't C.A. Br. 5-6.

The meeting on June 20 took place at a hotel in San Antonio, where it was recorded by a hidden video camera. Due to a misunderstanding, and because Castiglioni could not supply the required pesos, no transaction occurred that day. During the meeting, however, Agent Rangel made veiled references to drug dealing, and she and petitioner discussed illegal money laundering techniques. Rangel told petitioner that "my people down in * * * Florida wanted me to ask you some things, uh, we've got kind of a problem * * * we've got a lot of money coming in," which had to be put "into a useable form." When Rangel stated that "things are getting pretty warm in Florida," petitioner responded that the television show "Miami Vice" and similar shows "made everybody kinda jittery." Petitioner suggested that law enforcement agents were no longer satisfied "selling the boats and cars and everything" and "they want to get some more money out some place else and it's kinda dumb, it's stupid." Petitioner also agreed that "everybody's nervous." Pet. App. 4a-6a; Gov't C.A. Br. 6-8.

During that meeting, petitioner claimed that he owned two offshore corporations and that he could easily handle $500,000 at a time in currency transactions. He also boasted that he had influence with the Prime Minister of Bermuda, and he advised Rangel

to consider opening a bank account there. At one point, petitioner joked about the possibility that Rangel was a law enforcement officer: "I mean, you're not going to put somebody in jail over there if you were who, who you might be, I hope not. I'm going to knock on wood on that one." Pet. App. 6a; Gov't C.A. Br. 8-9.

Several times during the week after the June 20 meeting, petitioner telephoned Rangel with various proposals relating to money laundering. On June 27, 1989, Rangel returned one of petitioner's calls, and they arranged to meet on July 6 at a hotel in Laredo to exchange $60,000 for pesos. After the exchange, Rangel paid petitioner a six and one-half percent commission. Neither petitioner nor Castiglioni asked Rangel for the information necessary to complete a CTR, and no CTR was filed for the transaction. Pet. App. 7a; Gov't C.A. Br. 9-10.

After the July 6 transaction, Castiglioni exchanged United States currency for pesos on three occasions for Agent Rangel and another agent. On the first occasion, one of the agents told Castiglioni that their clients were "traffickers" who needed "money cleaned." At the second meeting, Castiglioni announced that he would charge an additional two percent fee for his services because of the dangers involved with laundering drug money. During the third meeting, the parties again discussed the illegal source of the funds. Pet. App. 7a; Gov't C.A. Br. 9-10.

On June 26, 1990, Castiglioni agreed to make an "emergency" exchange of $100,000 for pesos. Castiglioni informed Rangel that he was working with petitioner again and that petitioner would assist him in the transaction. Based on petitioner's advice that the service they were providing was

"worth a lot more for these people," Castiglioni insisted on a five percent fee for the exchange. When petitioner and Castiglioni arrived for the meeting as arranged, they were arrested. Pet. App. 8a-9a; Gov't C.A. Br. 10-12.

2. The court of appeals affirmed petitioner's convictions. Pet. App. 1a-21a. The court rejected petitioner's claim that the evidence was insufficient to sustain his conviction for conspiring with Enriquez and Castiglioni to fail to file CTRs. *Id.* at 10a-12a. The court likewise rejected petitioner's claim that the evidence was insufficient to sustain his conviction for conspiring to launder money represented by a law enforcement officer to be the proceeds of narcotics sales. *Id.* at 12a-14a. With respect to petitioner's sentence, however, the court concluded that the district court had improperly calculated his offense level under the Sentencing Guidelines, and it therefore remanded the case to the district court for resentencing. *Id.* at 17a-20a.

ARGUMENT

Petitioner contends that, in affirming his conviction for conspiring to violate 18 U.S.C. 1956(a)(3)(C), the court of appeals improperly dispensed with the requirement that a law enforcement officer must represent that the property involved in a money laundering transaction constitutes proceeds of a statutorily specified unlawful activity. Pet. 10-19.

The court of appeals did not disregard the "representation" element of Section 1956(a)(3)(C), as petitioner claims.[1] To the contrary, the court of ap-

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[1] Section 1956(a)(3)(C) provides in pertinent part:

peals stated that one of the essential elements of Section 1956(a)(3)(C) was that "the property involved in the transaction was represented by a law enforcement officer to be the proceeds of specified unlawful activity." Pet. App. 13a. In reviewing the sufficiency of the evidence to establish that element, the court "recognize[d] that Rangel never explicitly informed [petitioner] that the dollars were the proceeds of drug activity." *Ibid.* The court pointed out, however, that Agent Rangel "allude[d] to it strongly" during her meeting with petitioner on June 20, 1989. *Ibid.* The court observed that, "[w]hile Rangel's language with [petitioner] may have been ambiguous (unlike her [later] express representations to Castiglioni) to a layman, [petitioner's] responses reveal that [petitioner] understood her comments to mean that the currency came from drug trafficking activity." *Id.* at 14a. The court found further evi-

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(3) Whoever, with the intent—

* * * * *

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds of specified unlawful activity * * * shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph * * *, the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

Section 1956(c)(7) defines "specified unlawful activity" to include a wide range of crimes, including violations of narcotics laws.

dence that petitioner understood Rangel to mean that her funds derived from drug-related activities in the fact that, just prior to the June 28, 1990, meeting, petitioner "advised Castiglioni to charge a 5% commission because of the dangers of dealing with drug dealers." *Ibid.*

The court of appeals properly held that the jury could find from the evidence summarized above that Agent Rangel had made an implicit representation to petitioner that the funds he was being asked to launder were the proceeds of drug transactions. The statute does not require the representation to be explicit or to take any particular form; indeed, an explicit representation would be so unnatural in an undercover setting as to give rise to suspicion on the part of the target of the investigation. Because Rangel's statements, although guarded, were sufficient to apprise petitioner of the source of the funds, the court of appeals was correct in ruling that "there [was] sufficient evidence from which a jury might conclude that Rangel represented to [petitioner] that the funds were the proceeds of drug activities." *Ibid.*

There is no merit in petitioner's claim (Pet. 18-19) that the court of appeals' decision conflicts with decisions of the Second and Sixth Circuits. In *United States* v. *Stavroulakis*, 952 F.2d 686, 690-692 (2d Cir.), cert. denied, 112 S. Ct. 1982 (1992), the Second Circuit held that a conspiracy to violate Section 1956(a)(3)(B) does not require that co-conspirators all believe that money to be laundered is derived from the same unlawful source, as long as the unlawful source is proved to be one of the illegal specified activities enumerated in Section 1956(c)(7). In reaching that conclusion, the Second Circuit noted that it is "essential to culpability" that "the

money is represented to be the proceeds of one of the listed illegal sources." 952 F.2d at 691. In *United States* v. *Loehr*, 966 F.2d 201, 204 (6th Cir. 1992), cert. denied, No. 92-426 (Dec. 7, 1992), the Sixth Circuit similarly noted that, in order to prove a violation of Section 1956(a)(3)(B), "representations must be made by law enforcement officers, or those acting under their direction, and must relate to the specified unlawful conduct enumerated in the statute pursuant to § 1956(c)(7)." Those decisions merely state the elements of Section 1956(a)(3)(B), and in particular the requirement that a law enforcement officer represent the funds to be the proceeds of specified unlawful activity. Those decisions do not require that the representation be explicit or take any particular form.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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